IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 599.

MABLE SWALES FAIRCLAW,
Petitioner,

v.

JOHN FORREST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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The Respondent opposes the granting of the Petition for Writ of Certiorari herein and prays that the Writ be denied.

OPINION BELOW.

The District Court entered judgment dismissing petitioner's amended complaint on the merits without written opinion (R. 4). The United States Court of Appeals for the District of Columbia affirmed the judgment and its opinion is reported in 130 F. (2d) 829 (R. 15).

JURISDICTION.

The judgment of the Court of Appeals was entered August 4, 1942 (R. 23) and a petition for rehearing denied September 30, 1942 (R. 24). The petitioner has invoked the jurisdiction of this Court under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925. The respondent urges this Court not to assume jurisdiction, in that the case is not a proper one for review on writ of certiorari under Rule 38 of this Court.

QUESTION PRESENTED.

The only question is whether certain real estate situated in the District of Columbia which was owned by the testatrix, Mable Pryor, as surviving tenant by the entirety at the time of her death, passed to the respondent, John Forrest, under the residuary clause of the will of Mable Pryor which was executed during the existence of the tenancy by entireties, there being no specific devise of the property and the residuary clause being sufficiently comprehensive to include it, or whether the property descended as intestate property to petitioner and respondent as heirs at law. As stated by Mr. Justice Rutledge in the opinion of the Court of Appeals, the crucial issue is whether the interest of a tenant by entirety is devisable when the will is executed before he takes by survivorship (R. 18). The Court held that such an interest was one that testatrix was capable of devising, subject only to the contingency that her death before her husband's would have caused the devise to fail because in that event she would not have been the owner vested with the right of transfer at the time of her death (R. 21). Mr. Justice Stephens in a separate opinion concurred in the result but applied the local after-acquired property statute treating the complete control acquired by testatrix upon the death of her husband as an addition to

her interest which was property acquired after the execution of the will in a proper sense of the term (R. 22). In both opinions the property involved was held to pass to respondent as residuary devisee by virtue of the will.

STATEMENT.

Petitioner's amended complaint alleged in substance that certain real estate situated in the District of Columbia, designated as 120 You Street, Northwest, Washington, D. C., was acquired by Mable Pryor and her husband, Harry C. Pryor, as tenants by the entireties on January 18, 1926, (R. 9); that the will in question was executed November 20, 1928 (R. 3-4, 9); that Harry C. Pryor died in January, 1933, leaving Mable Pryor him surviving (R. 10); that Mable Pryor continued to be seized of said real estate as sole surviving tenant by the entirety until her death which occurred January 26, 1939 (R. 10); that Mable Pryor left surviving her a brother, John Forrest, who is the respondent herein, another brother, Samuel Forrest, who has since died intestate and unmarried, and a niece, Mable Swales Fairclaw, who is the petitioner herein, as her only heirs at law and next of kin (R. 10); and that the will in question was admitted to probate and record in the District of Columbia on September 15, 1939 (R. 11).

From these alleged facts it was contended by petitioner in her amended complaint that since Mable Pryor died without republishing her will or making any change therein after the death of Harry C. Pryor, she died intestate as to the real estate in question (R. 11). To this amended complaint the respondent interposed a motion to dismiss on the ground that the amended complaint failed to state a claim upon which relief could be granted (R. 13). Such motion was sustained by the District Court and that action affirmed by the Court of Appeals (R. 4, 23).

ARGUMENT.

(a) *Construction against intestacy.*

The premises 120 You Street, Northwest, is not specifically devised by any provision of the will and therefore must pass to John Forrest under the residuary clause which provides that "all the rest and residue of my estate, both *real*, personal and mixed, I give, *devise*, and bequeath to my brother, John Forrest . . ." (Italics added) (R. 4). The record shows that Mable Pryor had at least two brothers at the time of making her will. These brothers were named John Forrest and Samuel Forrest. She chose John Forrest as her residuary legatee and devisee. The fact that she chose John in preference to Samuel is a strong indication that she did not intend to die intestate as to any property. When making her will it is very reasonable to assume that she must also have contemplated upon the possibility of surviving her husband and in that event the will shows clearly that after certain specific bequests and legacies she intended John Forrest to have the remainder of her estate, both real and personal.

It is elementary that the purpose and function of a residuary clause is to make a complete testamentary disposition of the testator's estate so that no part of it may pass as intestate property. 69 *Corpus Juris* 413. That such was the testator's intention is evident from the wording of the residuary clause which specifically refers to "real" property and "devises" the same.

The general rule is well stated in 69 *Corpus Juris* 421, as follows:

> General words in a residuary clause will carry every interest of the testator, not otherwise disposed of, that is capable of being passed by a will unless it is expressly or by necessary implication excluded from its operation, be it immediate or remote, contingent, or reversionary, * * *.

Furthermore, the presumption is always against intestacy and the residuary clause should be construed so as to prevent it as regards any part of the testator's estate. 69 *Corpus Juris* 416-417.

In *Given* v. *Hilton*, 95 U. S. 591, Mr. Justice Strong speaking for this Court, at p. 594, said:

> The law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may reasonably be given.

(b) *Opinion of the Court of Appeals.*

It is extremely difficult for counsel to add any argument of substance to the full and well considered opinions rendered by Justices Rutledge and Stephens of the Court of Appeals and it seems quite unnecessary to attempt to do so. Although differing in reasoning the opinions are agreed as to the result, namely, that the property involved passed to the respondent, John Forrest, as residuary devisee. The essence of the opinion of the Court as stated by Mr. Justice Rutledge seems to be contained in the last two paragraphs of the opinion, which are as follows:

> Prior to the death of one it is always problematical which will survive. Each, technically seised of all, has an inchoate possibility of actually receiving all. The possibility is real and valuable, though uncertain. Mere possibilities are inalienable in the common-law system of estates. But this one is peculiar in being coupled, in legal theory, with a presently vested estate. This fact, coupled with the idea that inalienability in general is for the protection of the other spouse, raises the question whether a devise made by one spouse while the estate continues is wholly void or inoperative or may have the effect of a valid devise, effective if the other spouse dies first. Concededly, neither a conveyance nor a devise by one could become effective if the other should survive. Nor could there be an attachment or levy against the former under judicial process. But

beyond this there is no necessity in protecting the other spouse to prevent the survivor's conveyance, or devise, or an attachment or levy against him, from becoming effective. To do this would make the tenancy a protection against one's own improvidence, not merely against that of the spouse. We see no valid reason, from the viewpoint of protecting one spouse or the other, for not giving effect to the will of either disposing of the property, when the other dies first and the will remains unchanged and unrepublished until the death of the testator or testatrix. To do this can impair in no way the rights of either spouse acquired by virtue of the tenancy.

It is true as appellant points out that before the Wills Act of 1837 and the after-acquired property statutes the testator could not devise realty which he did not own at the time he made his will. This was on the theory that a devise of realty took effect on the date of the execution of the will. The statement, upon which appellant relies, "that the will speaks as of the date of execution, not of the date of death," is now merely a principle of construction. The date of execution fixes the time and circumstances for reference in ascertaining the intention of the testator. So far as this is merely a rule of construction, it cannot overcome the testator's clearly expressed intention. So far as it formerly applied to exclude after-acquired property from the effect of the will, Section 45 has overruled it. We do not understand it to be a rule of law in the sense that it renders property incapable of being devised. On the contrary, the will is effective as of the date of death. In determining whether the property of a testator passes by his will there is a presumption that he did not intend to die intestate, which is greatly strengthened by words of general description in the residuary clause. If the property or interest is devisable at the time of the testator's death, and if the testator has indicated sufficiently in the legal sense his testamentary intention to dispose of it, the will is effective to pass the title to

> the devisee. Here the intention of the testatrix to devise the property is clear. She owned the entire estate in fee simple when the will became effective. The interest was one she was capable of devising, subject only to the contingency that her death before her husband's would have caused the devise to fail. In that event she would not have been the owner vested with the right of transfer at the time of her death.
>
> The judgment is *affirmed*. (footnotes omitted)

In his separate opinion concurring in the result, Mr. Justice Stephens concluded as follows:

> Since at the time Mrs. Pryor executed her will she was already as a tenant by entirety owner and seized of the real property, it cannot be said that the same was "after-acquired property" in the usual sense of property title to which has been taken after the execution of a will. But although she was when she executed the will owner and seized of the property, she was not then capable of making a definitive devise of it, her husband still being alive. There was therefore lacking in her interest in the property as a tenant by entirety complete control in the sense of unrestricted power to deal with the property. Such complete control was acquired by Mrs. Pryor only at the moment of her husband's death, and that addition to her interest was I think in a proper sense of the term property acquired after the execution of her will. That being true and it being plain upon the face of her will that Mrs. Pryor intended to devise real property, if any she had, I think the property in question passed by virtue of her will and that therefore the decision of the trial court in the appellee's favor was correct.

From the foregoing, it is apparent that no member of the Court participating in the decision entertained the slightest doubt as to the correctness of the trial court's decision.

(c) *Comments on Petitioner's Application for Certiorari.*

Counsel for petitioner have undertaken at some length to analyze the opinions below and disagree with various phases of both the majority and minority opinions. It is not felt necessary herein to attempt to reply to the various arguments set forth by counsel for petitioner as they are adequately answered by the Court of Appeals. However, it should be pointed out that three District of Columbia cases cited in two places by counsel for petitioner in support of the proposition that "a will, with respect to the real estate it purports to devise, takes effect as of the date of its execution, and not the date of death of the testator", namely, *McAleer* v. *Schneider,* 2 App. D. C. 461; *Bradford* v. *Matthews,* 9 App. D. C. 438; and *Crenshaw* v. *McCormick,* 19 App. D. C. 494, were overruled by the later case of *Taylor* v. *Leesnitzer,* 37 App. D. C. 356, decided in 1911. In the *Taylor* case, the Court of Appeals applied the doctrine laid down by the Supreme Court in *Hardenburgh* v. *Ray,* 151 U. S. 112, in which Mr. Justice Jackson in closing the opinion of the Court, at p. 129, said:

> It may, therefore, be laid down as a general proposition, that where the testator makes a general devise of his real estate, especially by residuary clause, he will be considered as meaning to dispose of such property to the full extent of his capacity; and that such a devise will carry, not only the property held by him at the execution of the will, but also real estate subsequently acquired of which he may be seized and possessed at the date of his death, provided there is testamentary power to make such disposition. 1 Jarman on Wills, 326, 5th ed., and other authorities cited.

CONCLUSION.

The instant case involves only the application of well-settled principles to a particular situation. It presents no conflict of decisions. It involves no constitutional question

or question of general importance which has not been, but should be, settled by this Court. Furthermore, the decision of the Court of Appeals follows the applicable decisions of this Court and the law generally. The petition should be denied.

Respectfully submitted,

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